IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 1

FORD MOTOR COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 2

COMMERCIAL INVESTMENT TRUST CORPORATION, COMMERCIAL INVESTMENT TRUST, INC., UNIVERSAL CREDIT CORPORATION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA

REPLY BRIEF OF APPELLANTS

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Since the Government has filed a joint brief, covering both the above cases, we shall do the same in this reply.

For convenience, we shall follow the Government's arrangement of its argument, dealing first with the ques-

tions under paragraph 12a of the decree, which affect the rights of appellants in both Nos. 1 and 2 to suspension of the restraints imposed by paragraphs 6(i) and (k) (and in part by 6(e)) and 7(d) which have been referred to in the original briefs as the "restraints against persuasion"; and second, the right of the appellant, Ford, in No. 1 to be relieved of the restraints in paragraph 12 of the decree which have been referred to as the "bar against affiliation".*

I.

THE RESTRAINTS AGAINST PERSUASION.

The Government's brief reveals a complete misapprehension of the meaning of paragraph 12a of the decree. Its mistake is so patent and glaring as to make most of its argumentation actually irrelevant.

It is incontrovertible that the essentials which control the issue of appellants' rights to suspension of the restraints against persuasion are these:

1. The decree should impose no restraints on Ford and CIT which are not imposed on the larger and strongly entrenched GM and GMAC.

2. The test, for purposes of paragraph 12a, of whether any restraint, imposed on Ford or CIT in the relevant subdivisions of paragraph 6, was also "imposed" on GM and GMAC is whether the conduct en-

*Feeling that the Court will not be moved by the inflammatory and factually unfounded statements, or the irrelevant arguments, contained in the brief *amicus curiae*, and that the few relevant arguments are adequately covered in our reply to the Government's brief, we have not deemed it necessary to make any specific answer to the *amicus* brief.

joined by the particular restraint in question was held by the trial court in the GM criminal prosecution, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty.

3. The trial court's instructions drew a sharp line between coercion of the dealers, on the one hand, and non-coercive "exposition", "persuasion", "argument" and "advertisement", on the other, holding the former to be illegal and all of the latter to be "proper".

The Government nowhere controverts in terms the bases of the appellants' interpretation of paragraph 12a as developed in their original briefs. But, as we show in the ensuing argument, it makes a succession of points which could be pertinent only if premised on an assumption that the paragraph means something different from what it says.

The gist of the criminal charge against GM and GMAC was that they engaged in the several acts alleged in the indictment in order to "force" the dealers selling GM cars to use the financing facilities of GM's affiliate GMAC instead of those of any other finance company (R. 94-101; Govt. Br. 2). The verdict of the jury in the GM case meant that GM and GMAC had engaged in those practices with that purpose and effect. The indictment against Ford and CIT was never tried; it was dismissed in view of the Consent Decree here in question. What would have been the evidence in that prosecution had it been tried, and what would have been the verdict, can never be known. Manifestly, therefore, the test of whether Ford and CIT were to be restrained from any particular practice alleged in the GM indictment could not fairly be whether GM and GMAC

had been guilty of coercion and duress against the dealers. The Government was satisfied (Decree, par. 12a(1), R. 35) that, if the GM prosecution did not result in a conviction, all the injunctions against Ford and CIT should be suspended until substantially identical restraints and requirements should be imposed on GM and GMAC. But if GM were convicted, *the test was to be what the trial judge in the GM case held in his instructions to the jury to be illegal conduct* (par. 12a(2), (3)).

For purposes of applying this test, there is no need to differentiate between paragraphs 6(i) and 7(d) (R. 23, 32) relating to joint solicitation of dealers by representatives of Ford and CIT or any other finance company, on the one hand, and 6(k) (R. 30) enjoining Ford from recommending, endorsing or advertising CIT or any other finance company, on the other. Joint solicitation is but one form of persuasion, just as advertising, recommendation, exposition and argument are other forms. It was so treated in the GM case. The GM indictment did not mention joint solicitation, and the trial court did not refer to it in terms in its charge to the jury. And, since GMAC as well as GM was a defendant in that case, the following passage (R. 112) is an indication of the judge's view that it presented no problem different from the fundamental distinction between coercion and persuasion:

> "I think I said to you yesterday that the *defendants* may expound the alleged advantages of GMAC; *they* may explain fully the characteristics of its operations, as they claim they exist; *they* may point out the advantages; *they* may expound all of those things; *they* may persuade; *they* may use persuasion in their conversations, in their communications with

their dealers; *they* may even argue. Those things are all proper."*

Of course a visit to a dealer by representatives of the manufacturer and a finance company jointly may be coercive in character; and again it may not. So may, or may not, be a talk by a representative of the manufacturer alone with the dealer. Whether or not either is coercive depends upon all of the circumstances, including not only what is said but the setting surrounding what is said.

The Government's brief (pp. 25-26) accuses us, quite erroneously, of relying upon "isolated" portions of the charge "apart from their context", and of ignoring the "impact" of the charge "when considered in its entirety". Ford's original brief (p. 33) expressly relied upon the instructions "taken as a whole" and (p. 22) encouraged this Court to read the instructions through to determine whether our interpretation of them "viewed as a whole" is a fair one. Actually it is the charge as a whole upon which we chiefly rely, since it presents most clearly the controlling issue which the trial judge submitted to the jury,—the question of what constitutes coercion or duress. That is the heart of the charge. The distinction between coercion, on the one hand, and exposition, persuasion, argument and advertisement, on the other, is the main stream of the trial court's presentation, to which his particular applications and illustrations are tributary.

Of course, we have emphasized in our quotations those portions of the charge which held the things restrained in paragraphs 6(i) and (k) and 7(d) to be innocent and proper. They are of the utmost significance in interpreting

*All italics in quotations in this brief are ours.

the charge as a whole. But it is not, as the Government appears to suppose (Govt. Br. 28), our obligation to show that the trial court affirmatively approved the practices here in question. It is rather the Government's burden to demonstrate that the particular restraints of which appellants seek suspension were held by the trial court to be a proper basis for a general verdict of guilty. That is the test of whether the particular restraint has been "imposed" on GM and GMAC. And the decree says that it must be so imposed "in substantially *identical* terms".

Paragraphs 6(i) and (k) and 7(d) in the decree deal with recommendations, endorsements, advertisements or joint solicitations, as such, and regardless of circumstances. This is manifest, not only from the words of those subdivisions themselves, but by reading them alongside of other restraints in the decree which appellants here have never contended should be suspended, especially paragraphs 6(f) and (h). The judge in his instructions (R. 113) summarized the charge in the indictment as being that GM utilized the contracts with the dealers which were limited to one year "and might or might not be renewed", the cancellation clauses in those contracts, and "discrimination" between dealers in the shipment or non-shipment of automobiles, as a "club" upon its dealers and thereby "coerced them to use something which they, as free agents, would not have used". He added that "this coercion, this misuse" has proceeded, according to the indictment, "*beyond* exposition, persuasion and argument". Paragraphs 6(f) and (h) of the decree restrain practices which fall on the wrong side of the line which the trial court drew. The former says that Ford shall not deny "or threaten to deny" to any dealer any service or facility or "discriminate" among its dealers

for the purpose of influencing a dealer to patronize a particular finance company. And the latter says that Ford must not cancel any dealer contract "or threaten to do so" because of the failure of the dealer to patronize a particular finance company. Thus, Ford is effectively enjoined from any recommendation, endorsement or advertisement or any joint solicitation which, by reason either of its content or the circumstances surrounding it, is coercive in nature. Ford makes no claim that it should not be. But paragraphs 6(i) and (k) and 7(d) deal with matters that fall on the right side of the trial court's line. They relate to joint visits and recommendation, endorsement and advertisement, without more, and even in circumstances which would not permit any inference of coercion.

Nowhere in its brief does the Government expressly gainsay the above propositions. Instead it says (Govt. Br. 29):

> "If, under all of the instructions given, the jury [in the GM case] had found that the acts charged and proved constituted nothing more than 'recommendations', or 'persuasion', or 'exposition', or 'argument', the only alternative would have been to return a verdict of acquittal".

That concession should end the case. But the Government advances a series of arguments which would have no relevance at all, except upon an assumption that the plainly correct proposition stated in the concession is incorrect.

The first is in subdivision "A" of Point I of the argument (Govt. Br. 25-32). The point heading is, in substance, that the trial court instructed the jury that the practice by GM of recommending, endorsing and advertising GMAC, as well as joint solicitation of the dealers by agents

of GM and GMAC, constituted, "along with other practices", a proper basis for a verdict of guilty.

The phrase "along with other practices" is the give-away. It is implicit recognition that "other practices" (according to the trial court's charge, coercive practices) must occur along with recommending, endorsing, advertising or joint visits before a verdict of guilty would be justified. The necessary interpolation of the quoted phrase thus vitiates the pertinence of the Government's whole argument in this subdivision.

The Government (Govt. Br. 28-29) goes on to argue that, under the instructions given, the jury returned a general verdict of guilty [against GM]; and hence must have found that the conduct [of GM] "charged and proved" went beyond mere "recommendation", "persuasion", "exposition", and "argument" and constituted "coercion". All this is also completely irrelevant. The right of Ford and CIT, under paragraph 12a of the decree, to a suspension of the restraints against persuasion, was not to be judged by the guilt of GM under the evidence adduced in the criminal case. Under paragraph 12a(3) the court, upon application, "will" enter orders suspending these, among other, restraints to the extent that they are not "imposed", and until they shall be imposed "in substantially identical terms", upon GM. By the same provision, such "imposition" must be by decree or (R. 37) by the "equivalent" of a decree as defined in clause (2) of this paragraph. And under 12a(2) the *sole* measure of the "equivalent of a decree" is not what the evidence proved against GM, or what the jury found against GM, but the instructions of the trial court.

The argument (Govt. Br. 29-30, including footnote 14) concerning joint solicitation is a glaring example of the

fallacy which permeates the Government's brief. Its reliance is not on the trial court's charge but upon the evidence of the coercive character of the joint visits which the Government proved against GM and GMAC, and the summary of that evidence in the opinion of the Circuit Court of Appeals.

The Government merely begs the question in persistently using phrases implying that Ford will attempt to "dictate" the concern with whom dealers may finance cars (Govt. Br. 41, 45), that Ford will "control" the whole process of distribution (*id.* 42), that Ford will "insist" that its dealers use the services of a particular finance company (*id.* 43), or that CIT will be "forced" on Ford dealers (*id.* 45).* Ford would not be able to do any of these things by reason of the suspension of the restraints in paragraphs 6(i) and (k) and 7(d). Other provisions of the decree would effectively prevent it. All it could do would be to recommend, endorse, advertise and make joint solicitations. It would not even necessarily mean that Ford would recommend or endorse CIT. Ford might well recommend some other finance company or a group of such companies. But, if Ford should determine that CIT had the plan best suited

*The Government aggravates such unfounded implications by use of such phrases as "affiliated" finance company or "factory-affiliated" finance company in a context that implies such relationship between Ford and CIT (*e.g.* Govt. Br. 2, 7, 8, 9). In the first place, as shown in CIT's main brief (p. 7 and footnote), Ford has no stock interest in or affiliation with any of the appellant finance companies. In the second place, paragraphs 6(i) and (k) restrain Ford not only with respect to CIT but with respect to any finance company.

It is reasonably inferable that Ford is not prepared to contract an affiliation with CIT. If it were, it could easily get relief from the bar against affiliation, under the decision of the court below, by proposing a plan to that end.

to further the sale of Ford cars, Ford should be free to recommend CIT, and CIT should be entitled to receive the recommendation.

Under subdivision "B" of Point I (Govt. Br. 32-37), the Government relies on the dealer's supposed "ready susceptibility to factory influence" to support the argument that factory recommendations and joint solicitation necessarily constitute "coercion" and hence violate the Sherman Act. The assumption in the phrase first quoted is wholly without foundation in the record; and the sole support of it in the Government's brief is references to the evidence in the GM case (footnotes 16, 17 and 18, and the cross-references therein to prior footnotes, are wholly to that case) and the terms of the typical dealer contract, the use of which for purposes of coercion will, as we have shown, continue to be effectively enjoined under paragraphs 6(f) and (h) of the decree.

The Government inquires (Govt. Br. 36) what appellant, Ford, means by the term "persuade". Certainly Ford does not mean persuasion with a threat to enforce it by visiting upon the dealer cancellation of its license, failure to renew it or other discrimination. Paragraphs 6(f) and (h) enjoin such things, and Ford seeks no relief from them.

The Government further says (*id.* 36) that "the difference between a threat and 'persuasion' may involve such finely-drawn subtleties of language and conduct as to make the two indistinguishable". But paragraph 12a, making the test of suspension what the trial judge instructed the jury, together with his instructions, presupposes that recommendations, endorsements and advertisements by Ford, and joint solicitations by Ford and CIT, are not necessarily coercive. Moreover, the law is full of analogous instances

in which courts and juries must draw lines just as fine to determine whether conduct is legal or illegal. An example is *Thomas* v. *Collins*, 323 U. S. 516, where this Court considered a Texas statute requiring that labor organizers register before soliciting memberships in labor unions. The majority opinion said (p. 537-538):

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. * * * When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed."

Much the same question is presented by Section 8c of the National Labor Relations Act (as added by the Labor Management Relations Act of 1947, 61 Stat. 140, 29 U. S. C. A. § 158(c)) providing that the expression or dissemination of any views, argument or opinion shall not be an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit". The cases cited in the Government's brief (pp. 36-37) are inapposite. The first two are of the sort referred to in the last sentence of the passage of this Court's opinion above quoted; one of them is cited in a footnote to that sentence. The other cases cited by the Government are distinguishable as involving duress, threats or other conduct plainly denounced by the Sherman Act.

The Government's further contention (Govt. Br. 37) that even conduct in itself lawful may become unlawful when directed toward achieving an unlawful purpose and pursued along with other means which are clearly unlawful,

is irrelevant. This is not a case for the framing of a decree to prevent the recurrence and dissipate the effects of an adjudicated violation of the Sherman Act. It calls simply for interpretation of carefully considered language in a decree, agreed upon and entered without evidence, findings or adjudication of guilt, nearly ten years ago.

The Government concludes the tortuous thread of inadmissible assumptions and question-begging which constitutes its argument under this subdivision with the following sentence (Govt. Br. 37):

> "But whether the conduct enjoined by Paragraph 6(i), 6(k), or 7(d) of the decree be considered lawful or unlawful when viewed in isolation, or whether it be considered as unlawful because used to further an illegal purpose, the issue of legality was foreclosed when the conditional decree became absolute by the return of a general verdict of guilty against the General Motors Group under appropriate instructions to the jury, and the court below so found (R. 158-160)."

We can think of no comprehensible interpretation of this sentence except that it contends that the jury's conviction of GM settles everything. Actually, of course, it settled nothing which is at issue in this case. If the jury had not convicted GM, the entire decree against Ford and CIT, except paragraph 12a itself, would forthwith have become inoperative and been suspended (R. 35). It is only because GM *was* convicted that the questions involved in these cases regarding restraints on persuasion arise. Those questions are controlled solely by the terms of paragraph 12a. And the Government's brief leaves our argument on the true interpretation of that paragraph substantially untouched.

The remaining subdivision "C" (Govt. Br. 38-45) is devoted to supporting the trial court's finding No. 10 (R. 159) that Ford and CIT are not laboring under any competitive disadvantage with GM and GMAC by reason of the restraints contained in paragraphs 6(i) and (k) and 7(d) of the decree, and to contending, contrary to appellants' argument, that such a showing is a prerequisite to suspension of such injunctions. The factual argument on competitive disadvantage is sufficiently covered in the main briefs of Ford and CIT.

The Government's argument regarding the bearing of a factual showing of competitive disadvantage on the right to suspension of the restraints against persuasion is completely unsound. The case of *Chrysler Corporation* v. *United States*, 316 U. S. 556, relied upon by the Government (Govt. Br. 40-41), had nothing to do with paragraph 12a of the decree. It was concerned solely with the bar against affiliation, governed by paragraph 12 of the decree, which, as we have shown in the main briefs, is so different in origin and structure from paragraph 12a that this Court's reasoning in the *Chrysler* case is not even applicable by analogy to the issue under the latter paragraph. (And see 316 U. S., pp. 558, 559).

In the *Chrysler* case the Court extended its aid to prevent the permanent forfeiture of a restraint by reason of a short lapse of time. Under paragraph 12a there is no possibility of a permanent forfeiture, since that paragraph provides for re-imposition of the restraints against Ford and CIT in the event that they are subsequently imposed on GM and GMAC.

Implicit in these provisions was the equally manifest conception that competitive disadvantage would be inherent in a situation in which the larger and strongly-entrenched

GM and GMAC had a greater freedom of competitive action than Ford and CIT. This conception is evidenced by the statements made by Assistant Attorney General Thurman Arnold contemporaneously with the negotiation and entry of the Consent Decree (CIT Br. 41-43). The inherent competitive disadvantage is by no means merely theoretical. The consequences of the existing situation are severely practical.

Contrary to the Government's assertion (Govt. Br. 38), GM is not presently restrained, by virtue of the judgment of conviction in the criminal case, from endorsing, recommending or advertising its affiliate GMAC or arranging joint visits to dealers with it, in the absence of coercive features. In view of the instructions of the trial judge in the criminal case, neither the conviction nor its affirmance by the Circuit Court of Appeals would be *res adjudicata* in such a case. GM has no decree against it enjoining these things so as to be subject to contempt proceedings. Even if GM and GMAC were to do these things in circumstances from which a question of coercion might arise, the only risk they would run would be that of being attacked in a new criminal or civil case. Ford and CIT will be under the same hazard even if the restraints against persuasion in this decree are suspended. But Ford would *now* be subject to contempt proceedings if it said or did anything that might reasonably be construed as an endorsement, recommendation or advertisement either of CIT or of any other finance company, and both Ford and CIT would be in contempt if they made any joint visit to a dealer for the purpose of influencing his patronage, no matter how clear were the facts that nothing of any coercive character had been done, said or implied.

Our contention is not that the competitive disadvantage now suffered by Ford and CIT under paragraphs 6(i) and (k) and 7(d) is irrelevant to the purpose of paragraph 12a. It is rather that, under the express terms and clear intendment of that paragraph, it is not incumbent upon them to make a showing akin to one of "special damages" flowing from the inequality with GM and GMAC, such as particulars of loss of business and the like.

II.

THE BAR AGAINST AFFILIATION.

We find it necessary to add but very little to the discussion of paragraph 12 of the decree in the original brief of the appellant, Ford, in No. 1. Ford is alone concerned with the affiliation question.

The Government contends (Govt. Br. 50) that the decision of this Court in *Chrysler Corporation* v. *United States*, 316 U. S. 556, disposes "of all questions here raised except whether the court below erred in holding that Ford had not shown that it was under a competitive disadvantage by reason of being barred from affiliation with a finance company".

We do not agree. We submit that "competitive disadvantage" is not, under that decision, "the controlling factor" in this case, as the Government insists (Govt. Br. 50). In the *Chrysler* case (316 U. S., p. 563) the majority considered the finding of the District Court that the Government had proceeded diligently and expeditiously in its suit to divorce GMAC from GM and concluded that the finding "was not unreasonable", although pointing out that there was "room for argument" that such finding was "markedly

generous to the Government". The majority then said (*id.*): "The controlling factor *thus* becomes whether the extension of the ban on affiliation contained in paragraph 12 places Chrysler at a competitive disadvantage." The majority made it perfectly clear that the Government might lose "its right to *seek* a modification of the decree" by not proceeding "diligently and expeditiously" in its suit to divest GMAC from GM, and that in such event the existence or absence of competitive disadvantage would be immaterial. And so, even if the reasoning of the *Chrysler* decision were to be adhered to, the Government must here show diligence before the question of competitive disadvantage arises.

We have shown in Ford's main brief (Ford Br. 61-64) that the Government has not been diligent in its suit to divest GMAC from GM. The Government says (Govt. Br. 53) that "In the affidavit supporting our motion in the court below (R. 69-70)* we detailed the steps taken subsequently" to January 15, 1942. That is not the case. What the affidavit says is (R. 69) that "The plaintiff represents that it has proceeded with due diligence *since* the Court's order of December 31, *1944* * * *." And the activities to which the Government refers in its brief (Govt. Br. 53-54) all took place subsequent to December 31, 1944. The Government thus passes over the period of approximately three years from January 15, 1942 to December 31, 1944, and the record contains nothing to show what, if anything, the Government did during that period to bring about the divestment of GMAC from GM.

We should now add that it is nearly three years since the Government said in the affidavit referred to (R. 70)

*Filed in December, 1945 (R. 72).

that "it has exercised due diligence and will continue to exercise due diligence in securing an early trial date" of that case. No trial date has yet been set.

It is now over six years since this Court found, with obvious misgivings, in the *Chrysler* case, that the Government had not been unduly lacking in diligence in its prosecution of the GM civil case. A restraint on affiliation imposed nearly ten years ago has remained in effect nearly eight years longer than the time specified in the decree for its automatic cancellation.

We submit, therefore, that the Government has failed to show that it "has proceeded diligently and expeditiously in its suit to divorce General Motors Acceptance Corporation from General Motors Corporation", and accordingly has "lost its right to seek a modification of the decree" herein.

But, if this Court should not accept this interpretation of the *Chrysler* decision, we contend that Ford (Ford Br. 46-50, 64-66) has made a sufficient showing of competitive disadvantage from the bar against affiliation to satisfy this Court's requirements, even assuming *arguendo* that the inherent disadvantage of not being permitted to affiliate with a finance company, while GM retains its affiliation with GMAC, be not enough (see *supra*, p. 14). This Court said (316 U. S., p. 563) that Chrysler made "*no* showing" of competitive disadvantage in the District Court. It pointed out (*id.*, p. 564) that Chrysler had requested a continuance to February 16, 1942 in order to produce further evidence, but at that date no evidence was forthcoming. Certainly Ford is in no such situation. The factors of competitive disadvantage stated in Ford's petition (R. 89-90) and the facts adduced in the supporting affidavits (R. 118-125) are co-

gent and circumstantial. They are by no means limited, as the Government would have this Court believe (Govt. Br. 51), to evidence that Ford's percentage of participation in the total car market has decreased during the period in which the injunction against affiliation has been operative.

But, more importantly, the *Chrysler* case throws no significant light upon what this Court would consider sufficient as competitive disadvantage under the conditions of today. Since Chrysler had made no evidentiary showing, this Court had to deal with the question whether, as of *1942*, the disadvantage inherent in being restrained from contracting any affiliation with a finance company, while GM had not been divested of its affiliated company, was enough. This circumstance makes of controlling importance this Court's statement:

> "Moreover, we cannot be blind to the fact that the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor." (316 U. S., p. 564)

This Court should not now be "blind" to the common knowledge that production of new automobiles and light trucks was resumed some years ago and that GM, Ford and Chrysler are in most energetic competition in everything that affects the marketability of their products. We submit that in the present drastically changed competitive conditions, the question, whether the competitive disadvantage which is inherent in the restraint against affiliation is not enough, should be regarded as open. Everything said in the dissenting opinion (316 U. S., pp. 564-571) becomes apposite. At the very least, even if some special factual showing of competitive disadvantage be still required, there is no need that it be as detailed and comprehensive as

would have been the case when new automobiles and light trucks were not being manufactured.

Thus the position of the appellant, Ford, is that the *Chrysler* case is distinguishable from the present case. If this Court should disagree, Ford respectfully requests its reexamination of that decision.

Respectfully submitted,

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